No. 89-1089

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ATLANTIC RICHFIELD COMPANY,
Petitioner,
vs.
DON VAN VRANKEN,
on behalf of himself and others similarly situated, and
LEW & TED'S SERVICE, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

The question presented by the "Petition For A Writ of Certiorari To The Temporary Emergency Court of Appeals Of The United States," dated December 20, 1989 ("Petition"), does not accurately reflect the holding of the decision reprinted at Appendix A to the Petition. Neither is the issue framed by the Petition an extension or refinement of the appellate ruling.

Contrary to Petitioner's assertion, the decision of The Temporary Emergency Court of Appeals does not directly or indirectly require Petitioner to adhere to the requirements of a substantively or procedurally invalid federal regulation. Rather, the decision rejects the efforts of a firm regulated by the now expired controls on petroleum prices to subsequently reallocate costs and justify higher prices on the basis of that invalidation. The Temporary Emergency Court of Appeals concluded that the invalidation of the regulation made Petitioner's proposed allocation permissible, but not mandatory, and that established precedent restricting discretionary reallocations independently prohibits Petitioner's proposed action. Petitioner has mischaracterized the decision of The Temporary Emergency Court of Appeals and the question framed is not actually presented for review.

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COUNTERSTATEMENT OF THE CASE

To the extent Respondents disagree with Petitioner's Statement of the Case, such differences are either irrelevant to this Opposition or are reflected in Respondents' discussion of the reasons why the writ should not be granted.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner Atlantic Richfield Company ("ARCO") incorrectly attempts to portray the ruling of the Temporary Emergency Court of Appeals ("TECA") as one of general administrative law in conflict with the decisions of other courts of appeals. To the contrary, the holding turns on construction of two federal regulations peculiar to the complex regulatory program that controlled the prices of refined petroleum products between August 1973 and January 31, 1981. Further, the TECA decision does not concern the enforcement of an invalid regulation, but rather the effect of that invalidation on the ability of a refiner to retroactively reallocate costs from a regulatory category called "exempt products" to another category known as "covered products."

The TECA ruling has no current regulatory application since the petroleum price controls were lifted on January 28, 1981, by Executive Order No. 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981). The TECA decision is potentially relevant

only to those handful of civil damage and governmental compliance actions which are still pending. The decision affirms the unanimous conclusion reached by the five district courts who have considered this issue, and is based on the application of established TECA precedent which this Court previously declined to review.

I. THE DECISION OF THE TEMPORARY EMERGENCY COURT OF APPEALS DOES NOT CONCERN "COMPLIANCE" WITH A REGULATION THAT HAS BEEN DECLARED INVALID

ARCO erroneously argues that the TECA decision in *Van Vranken v. Atlantic Richfield Company*, 890 F.2d 421 (TECA 1989) (reprinted as Petition Appendix A, "the *Van Vranken* decision"), holds that an invalid regulation may nonetheless be enforced by the regulatory agency against all persons other than those who brought the suit which resulted in its invalidation. One will seek in vain to find such a ruling in the *Van Vranken* decision, which does not concern enforcement by the Department of Energy ("DOE") of the invalidated April 1974 amendment to the "V factor" regulation. Rather, *Van Vranken* considers whether that invalidation compels district courts in private damage actions to permit refiners to reallocate to covered products costs that were originally allocated to exempt products, and to use these reallocated costs as an offset to any overcharges that may be proved.

TECA's resolution of that question was determined by two issues: (1) whether the manner in which ARCO originally allocated its costs was itself rendered improper or illegal by TECA's invalidation of the April 1974 V factor amendment; and (2) if ARCO's original cost allocation was not invalid, whether ARCO's proposed reallocation is precluded by the prohibition on retroactive reallocations enunciated in *Eastern Air Lines v. Atlantic Richfield Co.*, 712 F.2d 1402, 1408-09 (TECA), *cert. denied*, 464 U.S. 915, 104 S.Ct. 278, 64 L.Ed.2d 790 (1983). TECA articulated the first issue as follows:

> ARCO urges that because *Mobil I* invalidated the 1974 amendment the only legal method for allocating increased crude oil costs is to allocate the increased crude oil costs for producing exempt goods to covered goods. For the following reasons, we reject this argument.

(Petition Appendix A, 5a.) TECA then found that the allocation originally employed by ARCO was legal and valid under the initial unamended version of the V factor, which continued to govern after the invalidation of the 1974 amendment:

> [E]ven absent the 1974 amendment, nothing in the regulations required that costs for exempt goods be attributed to covered goods when calculating the maximum allowable price for covered goods. In fact,

> the relevant regulation stated that "in computing [maximum allowable] prices . . . a refiner *may* increase its May 15, 1973 selling prices . . . by an amount to reflect . . . increased product costs. . . ." 10 C.F.R. Section 212.83 (c) (1) (emphasis added). Nothing in this regulation requires that a refiner bank or increase the price of covered goods to compensate for increased crude oil costs.
>
> [T]here was nothing unlawful about the manner in which ARCO allocated its increased costs.

(Petition Appendix A, 5a.)

Accordingly, TECA's approval of ARCO's original allocation of some crude oil costs to exempt products and other crude oil costs to covered products had nothing to do with restrictions imposed by the invalidated regulation. Rather, it was based on the permissive language regarding cost recovery in the concededly valid general refiner price rule, 10 C.F.R. Section 212.83 (c) (1). TECA concluded that the invalidation of the April 1974 V factor regulation did not require any change in ARCO's allocation in order to bring it into regulatory compliance.

This determination that ARCO's proposed change in cost allocation would be *discretionary* triggered application of the prohibition against retroactive reallocations enunciated by TECA six

and a half years earlier in *Eastern Air Lines*, *supra*, 712 F.2d at 1408-09. In *Eastern Air Lines*, TECA held that ARCO could not change at will from one cost allocation to another in offering proof of legal prices in a private damage action, even though either allocation would have been permitted initially under the substantive price regulations. TECA ruled that ARCO was bound to follow the cost allocation it had actually elected during the regulatory period. *Id.* at 1408.

It is the application of the *Eastern Air Lines* ruling, and not the enforcement of an invalid regulation, that precludes ARCO from making a retroactive change in its cost allocation. TECA specifically considered and rejected ARCO's argument that the *Eastern Air Lines* ruling was inapplicable because ARCO allegedly made its original cost allocation on the basis of the later invalidated April 1974 V factor. TECA found that a refiner's reasoning in making its original cost allocation was not relevant to the *Eastern Air Lines* prohibition against reallocations: "[t]he failure to obtain permission from the DOE [to retroactively reallocate costs], not the nature of the initial allocation of costs, determined the outcome in *Eastern Air Lines*." *Van Vranken*, *supra*, Petition Appendix A, 7a. Accordingly, there is no basis for ARCO's claim that TECA's holding "would authorize DOE to use the refiling regulation to preserve substantively and procedurally invalid regulatory requirements" (Petition at 5, n.3.) Rather, the discussion of

ARCO's failure to distinguish *Eastern Air Lines* is the only aspect of the *Van Vranken* decision which touches on the DOE's filing or enforcement regulations.

Similarly, TECA's discussion of ARCO's ability to have joined Mobil Oil Corporation's challenge to the amended 1974 V factor was directed solely to ARCO's attempt to avoid *Eastern Air Lines*, and not to whether ARCO was required to continue abiding by an invalidated regulation. TECA was merely observing that ARCO had not been helpless, and could have challenged the DOE's rejection of its retroactive refilings or intervened in the Mobil litigation if it had been intent on perfecting its election to reallocate. *Van Vranken, supra*, Petition Appendix A, 8a. Having done nothing, ARCO is bound by the rule of *Eastern Air Lines* since the invalidation of the April 1974 V factor regulation does not automatically translate into the retroactive cost reallocation that ARCO now finds desirable.

II. ARCO'S REQUEST FOR REVIEW OF THE *VAN VRANKEN* DECISION FAILS TO SATISFY ANY OF THE CRITERIA FOR ISSUANCE OF A WRIT OF CERTIORARI

The general considerations governing the grant of a writ of certiorari to review a federal appellate decision are set forth in Rule 17 of the Rules of this Court. ARCO's Petition fails to present any "special and important reasons" for

this Court to review a narrow TECA decision concerning the use of crude oil costs incurred between April 1974 and February 1976 in the calculation of prices controlled by a regulatory program that was dissolved nine years ago.

The Temporary Emergency Court of Appeals is a specially constituted appellate court with exclusive nationwide jurisdiction over litigation arising under the Economic Stabilization Act of 1970 ("ESA"). ESA §211, 12 U.S. C. §1904 note; and the Emergency Petroleum Allocation Act of 1973 §5, 15 U.S.C. §754(a). TECA can not conflict with "another federal court of appeals" when it speaks to an issue concerning the price control regulations since no other federal appellate court has jurisdiction to address these issues. Moreover, as noted in *Van Vranken*, ARCO's contention that "in light of the invalidation of the 1974 amendment, it *must* retroactively reallocate its costs from exempt to covered goods" had been rejected by at least five district courts before TECA finally resolved the issue. *Van Vranken, supra*, Petition Appendix A, 4a-5a (emphasis in original). It appears that the only disagreement present here is between ARCO and the federal judiciary.

ARCO's Petition is grounded solely on the argument that TECA has broken with other federal appellate courts to permit the enforcement of an invalid regulation against all except the party who originally challenged its

promulgation. Since that assertion does not accurately reflect the TECA decision, and ARCO does not offer any other reason why this Court should issue a writ of certiorari, there are no grounds upon which the requested review can be granted.

CONCLUSION

Far from being a "prescription for regulatory chaos" (Petition at 8), the *Van Vranken* decision conservatively and narrowly applies a seven year old prohibition against retroactive cost reallocations under the DOE price controls. This prohibition is grounded in principles of finality and consistency in regulatory programs which are monitored through periodic reporting by regulated entities. No invalid regulation is being applied to ARCO. Neither is it being treated differently from "similarly situated parties," since all refiners are equally subject to the *Eastern Air Lines* preclusion on retroactive cost reallocations. ARCO's Petition does not present an issue which should occupy this Court's valuable and limited time. Accordingly, Respondents respectfully submit that the requested writ should be denied.

Dated: February 7, 1990

Respectfully submitted,

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